REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 79 of 1998

KENYA CREDIT TRADERS LIMITED ……………..………… APPELLANT

VERSUS

JAMES KAHUGU KURIA ……………..……………………… RESPONDENT

J U D G E M E N T

There are three (3) appeals here, numbers 72,79 and 278 all of 1998.

They arise from the decision of the Business Premises Rent Tribunal case Nos. 346/97, 347 and 354 of 1997 delivered on 27th February 1998.

Kenya Credit Traders (Ltd), William M. Kimani Trading as Abebas Bar and Restaurant and Gichuhi Macharia t/a Kaka Hotel, the appellants herein, were tenants occupying portions of business premises known as L.R No.209/1195/1 situated in Nairobi owned by James Kahugu Kuria, the landlord respondent herein.

On 25th April, 1997, the respondent issued the appellants with notice to increase rent from Kshs.8,000 to Kshs.37,756/= in respect to Kenya Credit Traders (Ltd), the appellant in High Court Civil Appeal No. 79 of 1998), from Kshs.6,200/= to Kshs.59,326/= in respect of Kaka Hotel (appellant in High Court Civil Appeal No. 72 of 1998 and from Kshs.4,500/= to Kshs.46,451/= in respect to Abebas Bar and Restaurant (appellant in High Court Civil Appeal No. 72 of 1998).

The parties filed and relied on their respective valuation reports on which the Tribunal also relied and wrote its judgement on 27th February, 1998.

The Tribunal assessed new rents as follows:-

(1) Kenya Credit Traders Ltd Kshs.34,555/= p.m.

(2) William Kimeru t/a Abebas Bar & Restaurant Kshs.32,185/= p.m.

(3) Gachuhi Macharia t/a Kaka Traders Kshs.48,900/= p.m.

And all the new rents were to take effect on the respective dates of the notices.

The appellants were not satisfied with these assessments and/or the effective dates and they filed the appeals already stipulated herein before.

The appeal by Kenya Credit Traders Limited was filed on 30th March, 1998 in a memorandum of appeal which listed the following five (5) grounds of appeal; namely:-

(1) That the rent as assessed is so inordinately high as to amount to entirely erroneous estimate of the fair market rent in respect of the premises,

(2) That the learned Chairman totally disregarded all the comparable, used on behalf of the tenants in Tribunal case number 340 and 354 of 1998 (which were consolidated with case No. 347 of 1997) without proffering any or any sufficient reason therefore, when the said comparables were infact relevant and necessary in assisting the Tribunal in arriving at a fair assessment of the market rent of the premises in question.

(3) That the learned Chairman misdirected himself in fact and in law in finding that there were peculiar factors causing the comparables referred to in 2 above to attract low rents without conducting any investigation or inquiry prior to making such finding.

(4) That the learned Chairman misdirected himself in fact and in law in applying extrapolated rents in the comparables used by the handwards valuers while there was no basis for extrapolation as the rents in the comparables were current as at the date of the valuation.

(5) That there was no basis whatsoever for merely averifying the analyses of rent in the tenants and landlords valuation reports in arriving at a correct assessment of the rent payable.

On the other hand, the appeal by Kaka Hotel was filed in this court on 4th August, 1998 in a memorandum of appeal which listed 7 grounds of appeal; namely:-

(1) That the learned Chairman erred in consolidating or treating as consolidated B.P.R.T. case No. 346 of 1997 with B.T.R.T. case No. 354 of 1997 and 347 of 1997.

(2) The order for consolidation was irregular and prejudicial to the appellant.

(3) The learned Chairman failed to appreciate that the premises occupied by the appellant should attract lower rental as they were upstairs in an area opening to the back street unlike the premises occupied by the tenants in B.P.R.T. cases Nos 347 and 354 of 1997 who occupied shops on the ground floor opening to the main street.

(4) That the rent as assessed is so inordinately high as to amount to an entirely erroneous estimate of the fair market rent in respect of the premises,

(5) That the learned Chairman did not consider fully the comparables used on behalf of the appellant.

(6) That the learned Chairman having found as fact that the various valuations had serious disparities and that it was impossible to reconcile some of the valuation, erred in not calling oral evidence or conducting an inquiry.

(7) Having consolidated B.P.R.T No. 346 of 1997 with B.P.R.T case No.354 of 1997 and 347 of 1997, the learned Chairman erred in awarding a total of Kshs.124,896/= as costs to the respondent out which the appellant was to pay an excessive amount of Kshs.43,794/=.

While the appeal by William Kimani t/a Ababas Bar and Restaurant was filed on 24th March, 1998 in a memorandum of appeal which listed 6 grounds of appeal as follows:-

(1) The learned Chairman erred in law and in fact in basing his assessment on premises which are in a different locality than the suit premises.

(2) The learned Chairman erred in law and in fact in disregarding the appellants' assessment whilst it was based on premises which are in the same locality as the suit premises.

(3) The learned Chairman erred in law and in fact in making the assessment effective from the date of the notice,

(4) The assessment is exorbitant unjustified unreasonable and not in conformity with similar premises in the locality.

(5) The learned Chairman erred in law and in fact in awarding costs on the basis of each reference not considering that the cases were consolidated.

(6) The decision of the learned chairman is against the valuation reports filed.

When these appeals were fixed for hearing on 7th November, 2002 Counsel for the respondent (Mrs. Ndungu) applied that appeal High Court Civil Appeal No. 72 of 1998 be dismissed because apart from the appellant in that appeal having filed the memorandum of appeal, he neither filed a decree nor the record of appeal.

Counsel also said that at any rate this appellant had vacated the premises and efforts to trace him were futile and that he was not in court on the date of hearing the appeal.

The court considered the submissions and found that indeed since filing the memorandum of appeal this appellant had not filed the decree as required by the Civil Procedure Rules or the Record of appeal.

Neither his counsel or himself was in court to urge his appeal and on these considerations we decided to and did dismiss this particular appeal with costs.

As for High Court Civil Appeal Nos. 79 and 278 of 1998, their counsel Mureithi and Nderitu appeared and submitted respectively in respect thereof while the respondents counsel in both opposed them.

Mr. Nderitu for the appellant in appeal number 79 of 1998 submitted that the appeal was against the assessed rent which was inordinately high from Kshs.8,000/= to Kshs.34,555/= per month.

According to him since 1990 rents have dropped and continue to drop to the present day.

That the tenants comparables were ignored and that only the hardwards report was considered.

According to this counsel the Chairman was duty bound to consider and look at all valuation reports before making a decision.

That the Chairman is supposed to enter and inspect the building and that in the case subject to this appeal the Chairman should not have said there were peculiar circumstances without making an inquiry and/or judicial viewing.

Counsel complained about the zoning method used in this assessment as there was no consistency. That this counsel can error in principle.

That there was no basis or rationale for merely averifying the analysis and that there was merit in allowing this appeal. Counsel suggested that the rent should be reassessed in this appeal.

Counsel for the appellant is appeal number 278 of 1998 (Mr. Mureithi) submitted that he was appealing against assessment and that the Chairman erred in consolidating the two appeals because each

tenant was served with a separate notice of increase of rent, each was represented by a different advocate and that each put in a separate valuation report.

That in any case was no order for consolidation and this was prejudicial to the appellant.

That the landlord produced only one valuation report which did not cover the whole area as it assessed the area was on the ground floor.

This counsel submitted that the Chairman did not consider all the valuation reports and never called valuers to testify.

That he erred in awarding costs of Kshs.124, 890/= to the landlord as there was no basis for awarding them.

As for the landord, Mrs. Ndungu for him submitted that High Court Civil Appeal Number 79 of 1998 was filed out of time and there was no order sought to extend the time for filing such appeal. She prayed that this particular appeal be struck out.

And on this appeal generally she submitted that under section 9(2)(a) the tribunal (Chairman) is empowered to determine rent and he acted properly and Judicially in determining or assessing the rents subject to this appeal.

Counsel stated that the zoning system was with valuation report by the tenant and that the same tenant cannot come to this court to dispute the same method he recommended.

That parties consented to rely on valuations reports and that if the tenant desired, it was for him to call for viva voce evidence as the onus was on him to prove his reference he filed before the tribunal.

That it was a fair to way of assessing rent under zoning system, starting with the ground floor, upper floor and the stone.

According to counsel the tenant's valuations agreed that the rent was due for increase and that thee was no evidence that decreasing the gos rent had been dropping. She praying that appeal No. 79 of 1998 be dismissed with costs.

As regards appeal No.278 of 1998 counsel submitted that consolidation of the references was proper and done for the sake of convenience and with the consent of all the parties.

According to counsel the tribunal had a discretion to disregard comparable and that the landlord's report was considered because it adopted similar method and analysis of one premises to the other.

She submitted that parties should not complain about costs assessed by the tribunal because no objection was raised about it in the same tribunal as such assessment was done in the presence of all the parties. She urged court to dismiss this appeal as well.

These are the submissions heard and recorded by this court and from which a decision should be made one way or the other.

In both appeal numbers 79 and 278 of 1998 the issue was excessive increase of rent and the award of costs on each individual reference..

In appeal number 79 of 1998 the rent was increased from Kshs.8,000/= per month to Kshs.34,555/= per month while in appeal number 278 of 1998 the rent increase was from Kshs.6,200/= to Kshs.48,900/= per month.

In arriving at these figures the Tribunal relied on Valuation reports produced by the parties to the

references.

There were four (4) valuation reports. The respondent relied on a report prepared by prime valuers, dated 13th March 1997 and filed in court on 10th July 1997.

Gichuhi Wacheria T/A. Kaka Hotel relied on report prepared by City Valuers Limited, dated 29th September, 1997 and filed in court on 15th October 1997 while William Kimani T/A Abebas Bar & Restaurant relied on a report by Paramount Valuers dated 2.12.97 and filed in court on 4.12.97. It is noted, however, that this appeal was dismissed on 7th November, 2002. While Kenya Credit Traders relied on a report by Wamae Muriithi and Associates dated 14th July 1997 and filed in court on 6th November 1997.

On those reports, three or four issues have been raised by counsel for the appellants. Firstly that the Chairman erred in disregarding some valuation reports while relying on others.

We have perused and considered the Chairmen's judgment on this aspect.

The Chairman said this is his judgment about the reports:-

"***In assessing rents, it is necessary that all the four valuation reports filed in these cases be considered together because they all relate to premises in the same building. Looking at the four reports one notices that there are serious disparities in the rental analysis per unit area used by each of the valuers in arriving at the rental value of the different premises.***

The disparities are so serious that it is impossible to reconcile some of the valuation reports with the others."

The Chairman then went on to show the disparities in the rates per square ft in both the ground and upper floors, between valuation reports by the four valuers and found that those by prime valuers and Wamae Muriithi & Associates were fairly close such that their differences were within acceptable limits but that the other two valuers – (City Valuers Ltd. And Paramount Valuers) were far off the work and that it was difficult to believe that these two valuers were talking about shops in the same building.

The Chairman was talking of the consideration and importance of looking at comparables and these considered suitable in the open market.

He considered the genuineness of Kshs.9/= per sq.ft. for the ground floor shop; Shs.29.78 per sq.ft, Shs.15/= per sq.ft or Shs.34.604 per square ft.

We have considered this observation carefully and, being the men on the ground, we are satisfied the Chairmen made a valid observation considering the situation of the premises and rightly valuation reports favoured the prime valuers and Wamae Muriithi &. Associates City Valuers and Kshs.15/= in the Paramount Valuers were not realistic considering that the premises are situated in the Nairobi Central business District along Race Course Road.

But after the Chairman disregarded the City Valuers and Paramount disregarded the City Valuers and Paramount Valuers reports he decided to apply the average rental analysis of all the comparables used by Prime Valuers and Wamae Muriithi & Associates to the lattable area by each of the tenants.

The issue of taking the average of comparables was discussed in ***Tala Investments Ltd. Vs. Green Spot Limited Civil Appeal No. 269 of 1993*** where Honourable Justice Shah, as he was that said:

"***In dealing with principles upon which a Tribunal should act in assessing rent its duty is to consider all the reports properly before it. The Tribunal must go into individual comparable to decide which is a better report rather than merely arrive at a mean figure, that is mean figure of the landlords and***

tenant valuer's reports. That is not a proper criteria."

This proposition is still persuasive and good law. However, we are not convinced that the departure from the proposition in Shah's judgment by the Chairman in the case subject to this appeal is fatal to his ultimate decision.

A second and this issues raised in respect to the valuation report was why the Tribunal did not call viva voce evidence or why the Chairman did not carry out investigation before assessing the rents.

On this we wish to say that none of the counsel for the parties at the Tribunal requested for either viva voce evidence or that the Chairman make investigation before assessing rent.

We are satisfied all counsel engaged in the case accepted to have the assessment done from the valuation reports and none should be heard to complain on this appeal that viva voce evidence should have been called or that the Chairman should have carried out an investigation before assessing rents.

The appellant in Civil Appeal No. 79 of 1998 complained about the rooming system in the calculation of rent but reading through the valuation report by his clients valuer, we find this method was applied and we are surprised counsel disputes it on this appeal.

On the other hand, we agree there was no specific order to consolidate the Tribunal cases subject to this appeal but since the premises subject to the tribunal cases were all in LR. No. 209/1995/1 Nairobi and that all the references were against one and the same landlord it was only fair and appropriate and time serving that the cases be treated and heard as one case other than hearing them separately.

We see no merit in this ground of appeal.

As to whether the assessment of rent in the respect cases was inordinately high the appellant can only interfere with the Tribunal's assessment of rent if it was reached by/in

(a) mistake of law

(b) disregard of principle

(c) misapprehension of fact

(d) consideration of irrelevant matters

(e) lack of exercise of discretion

(f) obviously unjust method

(g) disregard of relevant matters

and

(h) undue regard for some factors and not enough for others of a combination of some or all of these eight (8) points.

· See ***<u>Karibu House Ltd. Vs Travels Bureau Ltd. [1980] KLR 27 at page 31.</u>***

The parties agreed the rent was due for revision but did not give the date or year the rent was increased last.

Though the counsel for the appellant submitted that during or since the 1990's rents had been dropping, there was no evidence at the Tribunal or on this appeal that this was the position.

And landlords investment in rental housing is actually intended for him/her to get a fair return for such investment regard being hard to the prevailing market rent.

The comparables included in the valuation reports accepted by the Chairman gave him the indications of the prevailing rents in the market at the time and that given the area of the premises involved in the references subject to this appeal, we are convinced the rent assessed did not breach any of the conditions given in the Karibu House Ltd. Case.

In our view, the appellants have failed to establish to our satisfaction that the Tribunal erred in any one of the right ways set out hereinabove so as to give no room to interfere with its assessment.

As to costs assessed by the Tribunal for each respective appeal, since all the three references had been treated as one from the initial stage with only one judgment being written and delivered in respect of them all, assessing costs on the basis of each individual reference was most inappropriate. In any case the record does not show where the Chairman got the figures Shs.42,369/=, 43,794/= and Kshs.38,733/= as costs for reference numbers 347/97, 346/97 and 354 of 1997.

Whatever scale is used, costs should have been awarded and assessed on consolidate references and that the Tribunal erred in regard to the assessment of costs.

Other than this the costs aspect of this appeal, we see no merit in it and do dismiss it with 2/3 costs to the appellant.

Delivered this 3rd day of December, 2002.

D.K.S. AGANYANYA

JUDGE